IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 27, 2007 Session

EMILY K. BOGGS v. WILLIAM B. BOGGS

Appeal from the Chancery Court for Williamson County
No. 31723 R.E. Lee Davies, Chancellor

No. M2006-00810-COA-R3-CV - Filed on August 17, 2007

This post-divorce appeal seeks reversal of two civil contempt findings and also contends that a *pendente lite* injunction restraining the disposition of funds violated a bankruptcy court stay. For the reasons stated herein, this Court finds no reversible error and remands for a determination of appropriate attorney's fees to be awarded to the appellee.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

WALTER C. KURTZ, SP. J., delivered the opinion of the court, in which ALAN E. HIGHERS and DAVID R. FARMER, JJ., joined.

William Barry Boggs, Franklin, TN, Pro Se Appellant.

Virginia Lee Story, Franklin, TN, for the Appellee, Emily Kirby Boggs.

OPINION

William Boggs (Appellant) and Emily Kirby Boggs (Appellee) were married on February 18, 2005. Their marriage was brief, and the two had no children. On July 27, 2005, the Appellee filed for divorce, and the Appellant was ordered to pay her $200.00 per week as temporary support; other *pendente lite* orders were also entered. In the course of this litigation, the Appellant was twice found to be in civil contempt, and this resulted in his *de minimis* incarceration. The trial court's orders finding the Appellant to be in contempt are the subject of these consolidated appeals. He contends that the trial court violated his due process rights and further erred when it enjoined him from dissipating funds located in his pension and IRA accounts.

The parties' divorce was granted by an order entered June 20, 2006. For such a short marriage this case was vituperative and marked by disputes over both finances and *pendente lite* spousal support. There were also allegations of domestic violence. The two contempt proceedings at issue resulted from the Appellant's failure to comply with court orders related to spousal support and other financial obligations. These issues were compounded when the Appellant, a psychiatrist, became unemployed and filed a bankruptcy petition during the pendency of the divorce.

The contempt proceedings below are best explained by setting out the two orders holding the Appellant in civil contempt. On March 9, 2006 the chancery court issued the following order:

> IT IS THEREFORE ORDERED ADJUDGED AND DECREED that the Court finds that Husband is in willful civil contempt of the lawful Orders of this Court as he has clearly violated the Restraining Orders by transferring funds to another account. Further the Court finds that Husband is in willful civil contempt by neglecting to pay the amounts Ordered for temporary support and expenses pendente lite as the Husband has the ability to pay but has failed and/or refused to do so. The Court finds that Husband has the ability to pay as he testified that he had moved over $36,000.00 out of the IRA which was under Restraining Order into a SunTrust account which he had been using to pay living expenses. Husband is incarcerated for his willful civil contempt in the Williamson County Jail. Husband has the ability to purge himself of said contempt by paying the sum of $3,200.00 to Wife for temporary support through February 2006, plus the sum of $4,419.00 for Wife's health insurance premiums which he allowed to lapse in violation of the Court Order from August 2005 through March 2006, plus the sum of $837.64 for utilities on the marital home and home owners dues for a total of Judgment of $8,456.64. Wife will also have a Judgment against Husband in the amount of $1,500.00 for Wife's attorney's fees for having to bring this Contempt action. That Husband has the keys to the jail and can purge himself of contempt by paying all of the above $8,456.64 in full and the Clerk and Master is authorized to pay all amounts to Wife immediately upon Husband's payment.

According to the Appellee, the record reflects that the Appellant paid the necessary amount and was released from custody almost immediately. While there is no citation to the record that would support this assertion, the Appellant does not disagree.

The second contempt finding is reflected as part of the final divorce decree, which was entered June 20, 2006:

> The Court finds that Husband has the ability to pay and chooses not to pay the amounts as ordered by this court and that Husband intentionally failed and/or refused to comply with the Orders of this Court. Husband is in willful civil contempt of the lawful Orders of this Court and hereby Orders that he be incarcerated in the Williamson County Jail until he purges himself of Contempt by paying the sum of

> Thirty One Thousand Four Hundred Eight and 96/100 ($31,408.96) Dollars. The Clerk and Master is currently holding in the court's registry the amount of $894.75. The Clerk and Master shall be authorized to apply $493.50 toward Husband's court costs and apply the remaining amount of $401.25 toward the contempt judgment. Husband shall receive a credit for the $400.00 paid to the General Sessions Court No. 16281A. Upon paying the remaining amount of $30,607.71 directly to the Clerk and Master, Husband shall be released from jail. The Clerk and Master shall be authorized to immediately upon entry of this entry, disburse $31,008.96 to the wife.

The Appellee again states that the Appellant paid this amount and was almost immediately released. And, again, although the Court is unable to find this information in the record, the Appellant does not dispute that he quickly complied with the court's order this second time as well.

In his brief the Appellant succinctly states his position as follows:

> Defendant contends that the court erred when it failed, at both hearings, to provide adequate notices for hearing the contempt motions, failed to stipulate whether the contempt hearings were civil or criminal in nature, and failed to affirmatively find that the defendant had the ability to pay the judgment for which he was held in contempt. Further, defendant, who was unemployed at the time of both hearings, argues that the trial court, having restrained all his assets, erred when it failed to conduct an indigency test, filed three weeks prior to hearing, and failed to inform defendant of his right to counsel at both hearings although criminal changes had been brought against him.[1] Further, defendant argues that the court acted improperly when it restrained his separate property that was under the jurisdiction of the Chapter 13 bankruptcy trustee.

The Appellant requests that this Court vacate these contempt orders "and remand all matters, except the granting of divorce, to the trial court for rehearing."

CONTEMPT ISSUE

The contempt proceedings in the trial court suffer from a lack of clarity. Neither the Appellee nor the trial court initially made clear whether the proceedings were civil or criminal in nature. Moreover, the trial court at the March 3, 2006 allowed the Appellee to wait until the end of the hearing to elect the type of contempt sought.

This Court and the Supreme Court of Tennessee have made clear that there is a significant difference between civil and criminal forms of contempt. *See Overnite Transportation Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507, 510-11 (Tenn. 2005); *Ahern v. Ahern*, 15 S.W.3d

[1] The record reflects that the Appellant was in fact represented by counsel at the first contempt hearing.

75 (Tenn. 2000); *Black v. Blount*, 938 S.W.2d 394 (Tenn. 1996); *Bailey v. Crum*, 183 S.W.3d 383 (Tenn. Ct. App. 2005); *Freeman v. Freeman*, 147 S.W.3d 234 (Tenn. Ct. App. 2003). Then Judge, now Justice, Koch, in a case not dissimilar to this one, has explained:

> An act of contempt is a willful or intentional act that hinders, delays, or obstructs the court's administration of justice. *Ahern v. Ahern*, 15 S.W.3d 73, 78 (Tenn. 2000); *Winfree v. State*, 175 Tenn. 427, 431, 135 S.W.2d 454, 455 (1940). An act of contempt may be either civil or criminal in nature, *Reed v. Hamilton*, 39 S.W.3d 115, 118 (Tenn. Ct. App. 2000), and determining whether a punishment for contempt is civil or criminal depends on the character and the purpose of the sanction imposed. *Robinson v. Fulliton*, 140 S.W.3d 304, 309 (Tenn. Ct. App. 2003).
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> Sanctions for criminal contempt are punitive in character, and their primary purpose is to vindicate the court's authority. *Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d 465, 474 (Tenn. 2003); *Black v. Blount*, 938 S.W.2d 394, 398 (Tenn. 1996). Criminal contempt sanctions are imposed simply as punishment, *Ahern v. Ahern*, 15 S.W.3d at 79, and persons imprisoned for criminal contempt cannot be freed by eventual compliance with the court's orders. *Robinson v. Fulliton*, 140 S.W.3d at 310. Unless the contemptuous act was permitted in the presence of the court, proceedings for criminal contempt must comply with Tenn. R. Crim. P. 42(b). Persons charged with criminal contempt are presumed innocent and may not be found to be in criminal contempt in the absence of proof beyond a reasonable doubt that they have willfully failed to comply with the court's order. *Black v. Blount*, 938 S.W.2d at 398; *Thigpen v. Thigpen*, 874 S.W.2d 51, 53 (Tenn. Ct. App. 1993).
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> Civil contempt sanctions, unlike criminal contempt sanctions, are intended to coerce a party to comply with the court's order. *Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d at 473. Their purpose is to enforce private rights. *Black v. Blount*, 938 S.W.2d at 398. Persons found to be in civil contempt "hold the keys to the jail" and may purge themselves of contempt by complying with the court's order. *Robinson v. Fulliton*, 140 S.W.3d at 309; *Garrett v. Forest Lawn Mem'l Gardens*, 588 S.W.2d 309, 315 (Tenn. Ct. App. 1979). Persons who have failed to make payments required by a previous court order may be held to be in civil contempt only if the court concludes, by a preponderance of the evidence, that they have not made the payments even though they have the present ability to do so. *Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d at 474; *Ahern v. Ahern*, 15 S.W.3d at 79; *Loy v. Loy*, 32 Tenn. App. 470, 479-80, 222 S.W.2d 873, 877-78 (1949).
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> . . . .
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> The trial court committed another error that undermines the portion of its judgment imposing civil contempt sanctions against Mr. McPherson. The trial court, in effect, was conducting a civil contempt proceeding and a criminal contempt proceeding

> simultaneously. We have pointed out that such proceedings are fundamentally flawed and should be avoided because of the significant differences in the respective burdens of proof and the procedural rights accorded to the persons accused of contempt. *Cooner v. Cooner*, No. 01A01-9701-CV-00021, 1997 WL 625277, at *6-7 (Tenn. Ct. App. Nov. 14, 1997) (No Tenn. R. App. P. 11 application filed). Criminal and civil contempt proceedings should be tried separately. *Freeman v. Freeman*, 147 S.W.3d at 243-44.

McPherson v. McPherson, 2005 WL 3479630, at *3-5 (Tenn. Ct. App. Dec. 19, 2005).

The Appellant's argument regarding these contempt proceedings, however, possesses a fatal flaw: there is no prejudice to him. While the court below should have made clear that it was civil, not criminal, contempt that was at issue, the orders the court entered reflect a finding for civil contempt, and both orders clearly have findings indicating that the Appellant had the ability to pay. Furthermore, the Appellant takes no issue with the Appellee's assertion that he immediately paid the amounts found by the court to be due. Thus, while the proceedings in the trial court may have been flawed, the court was also correct – the Appellant did have the present ability to pay.

This Court has made clear in prior cases that, in civil contempt, faulty procedure will not warrant a reversal unless there is prejudice. *Lessley v. Shope*, 1999 WL 330178, at *2 (Tenn. Ct. App. May 26, 1999) (citing *Southern Bell Telephone and Telegraph v. Skaggs*, 34 Tenn. App. 549, 241 S.W.2d 126, 134 (1951)). Here, the plaintiff has already complied with the court's orders by paying the amounts set by the court. Although the Appellant challenges the procedures below, he did not assign error to the factual determinations that he owed money, nor does he disagree with the statement that it has been paid.

This appeal also raises an issue regarding the approach taken by the trial court in considering the Appellant's right to counsel at the June 13, 2005 hearing. An indigent facing possible incarceration for civil contempt has a right to counsel.[2] *Poole v. City of Chattanooga*, 2000 WL 310564, at *7 n.4 (Tenn. Ct. App. March 27, 2000); *Bradford v. Bradford*, 1986 WL 2874 (Tenn. Ct. App. March 7, 1986). At the beginning of the June 13th hearing, the Appellant informed the court that he had previously filed an affidavit of indigency and that he was without counsel. The court said that it would get to that issue at a later point and then commenced the proceedings.

The Appellant's own testimony on June 13, 2006 shows ready cash assets of over

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[2] The issue of whether a non-indigent has a right to counsel in a civil contempt proceeding involving possible incarceration is an open question in Tennessee and is not implicated by this appeal. Some courts have ruled that all defendants facing incarceration in a civil contempt proceeding have a right to counsel while others have held the right to counsel is available only for indigents. *See generally* 17 Am. Jur. 2d *Contempt* § 208 (2004); Jack W. Shaw, Jr., Annotation, *Right to Counsel in Contempt Proceedings*, 52 A.L.R.3d 1002 (1973 & Supp. 2007).

$30,000.00, and his claim of indigency is thus not creditable. The determination of indigency, however, should occur prior to a contempt hearing – not be conducted simultaneously with it. As it turned out, the Appellant was clearly not indigent, and there was no prejudice to him.

Another panel of this Court has stated:

> We agree with the father that the issue of the mother's civil contempt is now moot. She was incarcerated until she produced the child for visitation with the father. She apparently did so the next day. Therefore, the mother has complied with the courts order she now seeks to have us vacate. The record includes no request for relief from the incarceration for civil contempt during the period of incarceration. Because the mother has chosen to purge herself of the contempt and to comply with the court's condition for release, there is no relief this court can now provide her. "[A] case will be considered moot if it no longer serves as a means to provide some sort of relief to the prevailing party." *Ford Consumer Finance Co., Inc. v. Clay*, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998). The validity of the trial court's order finding her in civil contempt is moot. Accordingly, we will not address it.

Pfister v. Searle, 2001 WL 329535, at *4 (Tenn. Ct. App. March 28, 2001). The Appellant is, therefore, entitled to no relief on his complaints regarding the two civil contempt proceedings.

RESTRAINING ORDER

The Appellant next challenges the trial court's restraining order. As noted above, the divorce petition was filed on July 27, 2005. He contends that the trial court erred in issuing the following order on October 31, 2005:

RESTRAINING ORDER

TO: William Barry Boggs
C/O Fred D. Dance
Attorney at Law
238 Public Square
Franklin, TN 37064

> You are hereby enjoined and restrained from dissipating the funds in the parties' UBS pension account and the funds in your Individual Retirement Accounts, pending a hearing in this cause.

The Appellant asserts that this order ran afoul of the automatic stay that accompanied his filing for bankruptcy. According to him, the trial court was requested by a motion filed on

November 8, 2005 to set aside the restraining order, but this was denied by an order entered November 23, 2005. The November 8, 2005 motion, however, did not assert a conflict with the bankruptcy's automatic stay. The order of November 23, 2005 states merely that the motion to dissolve the restraining order is denied. Neither the motion nor the order mentions any conflict with the bankruptcy court's stay. The court below cannot be found in error for a ruling it was never called upon to make.

It further appears from the record that the Appellant's bankruptcy petition was subsequently dismissed on November 21, 2005 for the Appellant's failure to appear in bankruptcy court; it was later reinstated. Even assuming that the alleged conflict with the stay had been brought to the attention of the trial court in November 2005, it cannot be held in error for denying the motion to dissolve the restraining order when the bankruptcy had been dismissed. Furthermore, in January 2006, the bankruptcy court ordered the reinstated stay lifted and authorized the divorce to proceed.

Perhaps most importantly, the divorce was granted by an order dated June 20, 2006, and the restraining order is no longer in effect. As such, the divorce proceeding has been concluded, and any question as to the restraining order's validity is rendered moot.

For all the reasons set forth above the Appellant's assertion of error in the issuance of the restraining order is without merit.

ATTORNEY'S FEES ON APPEAL

Finally, the Appellee has requested that she be awarded attorney's fees on appeal. She contends that this appeal was frivolous and that she is entitled to attorney's fees pursuant to T.C.A. § 27-1-122. Given the confusion in the charging documents related to whether the contempt proceedings against the Appellant were civil or criminal in nature and the trial court's initial refusal to require an election between the two, we are not inclined to find this appeal frivolous.

There is, however, another theory asserted by the Appellee to support an award of attorney's fees. This Court may award fees in the appeal of a divorce case based upon the economic disadvantage of the prevailing party. This is set forth in a recent case as follows:

> As a final matter, Ms. Fox requests this court to award her the legal expenses she has incurred on this appeal. She asserts that she is economically disadvantaged and that she should not be forced to use the assets intended to support her in the future to pay the legal expenses that Mr. Fox's appeal has forced her to incur. We agree.
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> In appropriate circumstances, appellate courts may award prevailing parties their legal expenses incurred on appeal. These awards are generally withheld when both parties have been at least partially successful. *Smith v. Smith*, 984 S.W.2d 606, 610 (Tenn. Ct. App.1997); *Young v. Young*, 971 S.W.2d 386, 393 (Tenn. Ct. App.1997). Decisions regarding a request for attorney's fees on appeal in a divorce case should

> be made using the same factors in Tenn. Code Ann. § 36-5-101(d)(1) (Supp.2000) used to determine whether a spouse should receive an award for legal expenses incurred in the trial court. *Kincaid v. Kincaid*, 912 S.W.2d at 144. These awards should be viewed as spousal support. *Smith v. Smith*, 912 S.W.2d 155, 161 (Tenn. Ct. App.1995); *Gilliam v. Gilliam*, 776 S.W.2d 81, 86 (Tenn. Ct. App. 1988). Thus, parties may be entitled to an additional award for their legal expenses if they demonstrate that they lack sufficient funds to pay their legal expenses or that they would be required to deplete other needed assets to do so. *Brown v. Brown*, 913 S.W.2d at 170; *Kincaid v. Kincaid,* 912 S.W.2d at 144.

Fox v. Fox, 2006 WL 2535407, at *11 (Tenn. Ct. App. Sept. 1, 2006).

The record supports the conclusion that the Appellant, a psychiatrist, is economically advantaged compared to the Appellee. As was illustrated below, even with his filing bankruptcy, the Appellant possessed a remarkable ability to avail himself financially when necessary. Moreover, being a psychiatrist, he should also be well able to earn a substantial earning. This Court concludes that the Appellee is entitled to attorney's fees related to this appeal. On remand, if the trial court determines that the Appellant's circumstances are not as we envision, then the chancellor may take those facts into consideration when setting the amount of the award.

CONCLUSION

We affirm the orders of the trial court and remand the case for a determination of the Appellee's attorney's fees on appeal and for further proceedings as may be appropriate.

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WALTER C. KURTZ , SPECIAL JUDGE